IN THE

Supreme Court of the United States

78-392

October Term, 1978

DR. HAROLD TRACY, et ux.;
BIG BEND COMMUNITY COLLEGE, et al.,

Petitioners,

v.

ROGER R. RUTCOSKY and ROBERTA RUTCOSKY,
husband and wife,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

TABLE OF AUTHORITIES

Table of Cases

Page

Statutes

Other Authorities

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OPINIONS BELOW

Roger R. Rutcosky brought this action against Big Bend Community College (hereinafter BBCC) to recover compensation for the college's use of his intellectual work product, in educational programs conducted by the college at numerous military sites. Rutcosky authored, compiled and prepared, at the request of and for the use of BBCC, a unique

and individualized educational program. The program was specially designed to meet all of the criteria set forth by the Army in its solicitation letter to BBCC requesting a proposed predischarge educational program (hereinafter PREP) for military personnel in Europe. Rutcosky's work product was ultimately utilized by BBCC, as the basis of their educational programs conducted for military personnel in Europe.

The case was tried to the Honorable Harold E. Clarke who found in favor of Mr. Rutcosky. Judgment was entered against the college only. The court concluded that

> the PREP Proposal, compiled and authored by Roger R. Rutcosky and which content-wise is a plan of education that contains, inter alia, his unique application of a combination of educational ideas and theories and concepts brought together in an innovative form, is the "intellectual work product and property" of Roger R. Rutcosky, and consequently constitutes a recognizable interest protectable by law . . . .

(Conclusion IV). The court found that "the Army accepted Roger R. Rutcosky's PREP Proposal and agreed to contract with Big Bend Community College for educational services," (Finding XXXVI) and that

BBCC implemented the PREP program to its financial benefit.

The court based the judgment on the following alternative legal theories: (1) equitable estoppel; (2) promissory estoppel; (3) express contract; (4) implied in fact contract; and (5) quantum meruit.

The court found that the intent and understanding of the parties was that BBCC would compensate Rutcosky "for use of his intellectual work product" (Finding XVII) and concluded that "consideration or compensation in some form and amount was definitely within the contemplation of the parties" (Conclusion VI). The court further concluded that "there was no meeting of the minds and therefore no agreement as to exactly what form or amount of consideration or compensation was to be paid by Big Bend Community College to Ruger R. Rutcosky for his endeavors." (Conclusion VI). The court therefore fashioned an equitable remedy

> for the past and on-going use as well as implementation by Big Bend Community College of his intellectual work product and property contained in the PREP Proposal, and . . . awarded, as damages, a

> royalty based upon the gross revenues received by [BBCC] from PREP Europe . . .

(Conclusions IX and X). Since Rutcosky prevailed on his common law actions in state court, he voluntarily dismissed an action in federal court for infringement of statutory copyright.

On March 11, 1977, the trial court amended the judgment, extending the royalty to include revenues generated from a related but allegedly non-PREP agreement between BBCC and the Army.

BBCC appealed directly to the Washington State Supreme Court from both judgments. That court unanimously affirmed both judgments in an opinion filed on February 2, 1978. Rutcosky v. Tracy, 89 Wn.2d 602, 574 P.2d 382 (1978). The college's petition for reconsideration was denied on June 9, 1978. BBCC then applied to this Court for an order staying the mandate of the Washington State Supreme Court. That application was denied by Justice Rehnquist on July 3, 1978.

JURISDICTION

Respondents submit that this case presents no substantial federal question and that this court

therefore lacks jurisdiction over the matter. This contention is amplified infra.

QUESTIONS PRESENTED

A. Does this action by a private individual against a state college involving his right to be compensated for the use of his intellectual work product present a substantial federal question where: (1) the court's judgment was grounded on the alternative legal theories of estoppel, quantum meruit, infringement of common law copyright and express contract? and (2) the amount and form of compensation for the the use of the intellectual work product was fashioned by the court in the exercise of its equitable powers?

B. Does this action by a private individual against a state college present a substantial federal question where 10 USC § 2306(b) grants only the U.S. government certain rights against a contractor and does not purport to delineate the rights and obligations between the contractor and a third party?

C. Does 10 USC § 2306(b) necessarily void a contract between a college and a private individual which contemplates that the latter will be paid for the use of his intellectual work product when: (1) the college in fact utilizes that work product in performing educational service agreements for military personnel? (2) The trial court explicitly found that no contingent fee agreement existed between the college and the individual for the latter to solicit or obtain the agreement for the college? (3) The court explicitly ruled and the college agrees that no undue influence or improper means was involved?

D. Does 10 USC § 2306(b) apply to an agreement between the Army and the college when the agreement provides: (1) the Army grants to the college a license only to provide educational services to the GI's? (2) there shall be no financial obligation by the Army to pay for the services provided by the college to the GI's? (3) that any financial obligation to the college for providing the educational

services shall be the sole responsibility of the individual GI receiving the services? (4) that no warranties against contingent fees are included in the agreement which itself was drafted by the Army?

STATUTES INVOLVED

The statute which BBCC contends raises a federal question in this case is 10 USC § 2303 and 2306(b). The college contends it violated the statute by entering into what it characterizes as a contingent fee agreement with Mr. Rutcosky. The pertinent provisions read in part:

> § 2303 Applicability of Chapter
> (a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies . . . of all property . . . and all services, for which payment is to be made from appropriated funds.
>
> § 2306 Kinds of Contracts
> (b) Each contract negotiated under § 2306 of this title shall contain a warranty, . . . that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or a contingent fee, except a bona fide employee or established commercial or selling agency maintained by him

> to obtain business. If the contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or the contingency from the contract price or consideration.

A related regulation, 41 CFR § 1-1.507(3) (1971), provides that a warranty against contingent fees is not required if the Army is not contractually bound to pay more than $25,000.00.

Additionally, this case involves Public Law 91-219 (38 USC § 1695-1698), which authorized the creation of PREP.

STATEMENT OF FACTS

The trial of this case involved factual disputes between Mr. Rutcosky and BBCC. On October 31, 1975 Judge Clarke entered his Memorandum Opinion which was subsequently incorporated into the court's final Findings of Fact and Conclusions of Law by Conclusion XXV. In the Memorandum Opinion, Judge Clarke stated, inter alia:

> It is this court's opinion, as indicated, that the product produced by RRR [Roger R. Rutcosky] falls into the category of an idea that was manifested in the finished work product. It appears that the courts in this area generally protect what might best be called common law copyright.

> In this connection, some type of a royalty seems to be the most equitable method of compensation if there has been an infringement or appropriation of the work product or idea. In this regard, the court is cognizant of the fact that protection under a copyright runs for a limited period of time. I am not implying that we are bound by copyright law in this particular case, however . . . It appears to the court based upon all of the circumstances and factors presented, that RRR is entitled to a royalty based upon the gross revenues received from the PREP Proposal by BBCC.

It was subsequent to the court's memorandum opinion that BBCC, clearly based upon the equitable remedy of a royalty fashioned by the court, first raised the defense of illegality under 10 USC § 2306(b) by filing a "Trial Amendment to Defendant's Answer." The trial court then ordered additional hearings on the matter where the evidence was again reviewed both orally and by written briefs. At the conclusion of these hearings, the court, by way of its Conclusion of Law XXI, denied the motion on the grounds that there was no evidence supporting the defense of illegality:

> [T]hat the alleged defense of "illegality" of contract between Big Bend Community College and Roger R. Rutcosky, under 10 USC § 2306(b), 32 CFR § 7.103-20, Exec. Order 9001, etc. is not supported by sufficient

> evidence in the record to warrant conforming the defendant's pleading to the proof pursuant to CR 15(b) since, more particularly, illegality of a contract will not be presumed and defendants have not met the burden of proof of showing by a preponderance of the evidence in the record, which must be substantial and not a mere scintilla, that either in fact or law there was an "illegal" contract.

Discontented with the trial court's disposition of the illegality issue, BBCC has attempted to relitigate the issue. First in the Washington Supreme Court and now in this Court. It does so by making sweeping statements concerning contingent fees, solicitation and even negotiation by Mr. Rutcosky in a futile attempt to bring the Rutcosky/BBCC agreement within the proscription of the federal statute. The statements are not supported by the record in any respect and are in fact contradicted by the trial court's unchallenged Findings of Fact and Conclusions of Law. Without citation to the record, Findings of Fact or Conclusions of Law, BBCC advises this Court that both courts below ruled that BBCC and Rutcosky entered into an enforceable contingent fee agreement. Petitioner's Brief, pp. 2, 3, 12, 19.

In fact, the record discloses that the trial court expressly found to the contrary. That is, no contingent fee agreement existed (Finding of Fact XVIII, unchallenged on appeal):

> That BIG BEND COMMUNITY COLLEGE did not employ or retain ROGER R. RUTCOSKY and therefore did not agree to pay him a commission, percentage, or contingent fee, to solicit or secure a contract with the Army.

BBCC also characterizes Rutcosky as a "negotiator" and implies that he contracted with BBCC to negotiate and solicit the educational services agreement (hereinafter ESA) which BBCC entered into with the Army. There is no Finding of Fact or Conclusion of Law evidenced in the record that Rutcosky contracted with BBCC to negotiate with the Army. Likewise, there is no Finding of Fact or substantial evidence indicating that Rutcosky did, in fact, negotiate with the Army on behalf of the college with respect to the PREP or any other ESA. Unchallenged finding of fact XVIII, supra, states to the contrary. The only findings of fact that in any way related to Mr. Ruitcosky's contacts with the Army were also unchallenged on appeal and fall

far short of showing any contract with BBCC or attempts by Mr. Rutcosky to negotiate with the Army. They read:

> Finding of Fact XXXII:
> That by letter dated October 7, 1971, to Roger R. Rutcosky, Paul T. Kunkle, Safeguard Education Officer, requested further information from Roger R. Rutcosky re the submitted PREP proposal.
>
> Finding of Fact XXXIII:
> That Roger R. Rutcosky and other interested persons at Big Bend Community College had telephone conversations and communications with Dr. Arvil N. Bunch and other responsible officials representing the Army re the submitted PREP proposal.

Clearly, Rutcosky was never employed on a contingent fee basis within the contemplation of the statute nor was he a negotiator as BBCC implies. In fact, BBCC at all times denied that there was any agreement or contract between itself and Rutcosky. It further denied and denies up to the present date that it has at any time utilized Rutcosky's intellectual work product in the performance of its educational services for GI's or other servicemen in the context of the PREP program or any other ESA's. The distorted statement of facts offered by BBCC does require

respondent to further acquaint this Court with the relevant background of the case.

Rutcosky went to BBCC in September 1970 to teach English from September 1970 to June 12, 1971 (Findings IV and V). He had previously graduated from Bemidgi College in Minnesota, earning a BA in American Studies which is a blend of American Literature and American Social Intellectual History (RP 100; 248). He had also done post-graduate work at the University of Kansas in behaviorial sciences and minority problems (RP 100).

In June 1971, Rutcosky enrolled for the fall term at Washington State University to obtain a Masters Degree in Literature (RP 105-106). After BBCC's regular session ended on June 12, 1971, the college re-hired him as an English instructor for the summer session commencing June 14, 1971 and ending July 23, 1971 (Finding VI).

Concerned with the failure of BBCC's curriculum to attract students within its district, Rutcosky began to think about suggesting a unique alternative program which would do so (RP 156). Therefore, on July 26, 1971, he approached Dr.

Robert Wallenstien, the president of BBCC, to ascertain if state research funds were available for developing his ideas (Finding X). No research funds were available but Wallenstien showed Rutcosky a letter from the United States Army to BBCC dated July 21, 1971.

In this letter, sent to numerous colleges and universities throughout the United States, the Army "competitively solicited proposals that would conceptualize an imaginative, resourceful and flexible Pre-Discharge Education Program (PREP) to provide instruction and study for GI's in the Eighth Division Germany, to earn and receive a high school diploma." (Finding IX). Prior to the Rutcosky/Wallenstien meeting of July 26, BBC had not planned to respond to the Army solicitation letter and had not attempted to do any work in response to the Army solicitation letter. (Finding XIII). However, after Rutcosky had expressed his interest in developing unique ideas for education programs (without any personal knowledge of the letter from the Army), Wallenstien solicited and authorized Rutcosky to compile and author a PREP

proposal in accordance with the criteria expressed in the Army solicitation letter (Finding XV).

Rutcosky delivered a draft of his proposal to Wallenstien in the first week of September 1971 (Finding XXV). Wallenstien reviewed it, was pleased, and made no corrections (R 405). This 87-page PREP proposal contained a point-by-point response to the criteria of the Army solicitation letter (Finding XXI), and "as compiled and authored . . . was the exclusive work product of Roger R. Rutcosky." (Finding XXII). On September 24, 1971, BBCC transmitted Rutcosky's PREP proposal to the Army (Finding XXVIII). On October 28, 1971, the Army selected BBCC to offer its educational program to American GI's in Europe. That selection was based on the contents and merits of the proposal which was compiled and authored by Rutcosky (Finding XXXIV). On November 9, 1971, the Army and BBCC entered into an ESA (Finding XXXVI) granting BBCC permission to offer a PREP program to GI's.

Rutcosky's intellectual work product has proven to be a remarkable educational success and the program has expanded from the Army's Eighth

Division in Germany to other Army Air Force and Navy divisions and units throughout Europe. (Finding XLVIII; LI) (RP 591).

REASONS FOR DENYING THE WRIT

A. This Action by Rutcosky to Recover Compensation From BBCC for Its Use of His Intellectual Work Product Presents No Substantial Federal Question and This Court Accordingly Has No Jurisdiction

Where a judgment is (Berea College v. Kentucky, 211 U.S. 45, 53 L. Ed. 81, 29 Sup. Ct. 33 (1908), Fox Film Corp. v. Muller, 296 U.S. 207, 80 L. Ed. 158, 56 Sup. Ct. 183 (1935), Herb v. Pitcairn, 324 U.S. 117, 89 L. Ed 789, 65 Sup. Ct. 459 (1945), Wilson v. Loew's Inc., 355 U.S. 597, 2 L. Ed. 2d 519, 78 Sup. Ct. 526 (1958)), or might have been based upon an adequate and independent state ground (Stembridge v. Georgia, 343 U.S. 541, 96 L. Ed. 1130, 72 Sup. Ct. 834 (1952); Durley v. Mayo, 351 U.S. 277, 100 L. Ed. 1178, 76 Sup. Ct. 806 (1956); Black v. Cutter Laboratories, 351 U.S. 292, 100 L. Ed. 1188, 76 Sup. Ct. 824 (1956)), this Court lacks jurisdiction over the case.

1. The trial court's judgment awarding Rutcosky compensation for BBCC's use of his intellectual work product was based in part upon the additional legal theories of infringement of common law copyright, quantum meruit and estoppel, with the court employing its equitable powers to fashion a remedy--this basis of the judgment is adequate and independent from any potential federal issue arising out of an alleged contingent fee contract

Judge Clarke based the judgment on the alternative theories of infringement of common law copyright, quantum meruit, and estoppel. 10 USC § 2306(b) applies only to contingent fee contracts to solicit or obtain a government contract. Insofar as the judgment is based on the use of an intellectual work product, infringement of common law copyright, estoppel, or quantum meruit, no federal statute is even tangentially applicable and no federal question is presented. The Washington State Supreme Court has long recognized the right of an individual to be compensated for the use of his intellectual work product. Ryan & Associates v. Century Brew Ass'n., 185 Wash. 600, 55 P.2d 1053 (1936).

With respect to compensation, the court itself fashioned an equitable remedy on a royalty basis,

not because the court concluded that the parties had so agreed, but because the court thought a royalty would be the fairest. Judge Clarke explained:

> I have felt from the conclusion of the case after a reasonable time to consider it that Mr. Rutcosky had produced a product for which he had not been compensated and that the Court, based upon the evidence, should arrive at some fair method and basis of paying Mr. Rutcosky for a product that was used to the benefit of Big Bend Community College. My opinion still hasn't changed in that respect. That remains the same.
>
> . . .
>
> I want to be candid. I didn't frankly have much problem with that in my mind right or wrong. I did have a great deal of problem, and it caused me a lot of concern, as to how that should be handled, that is, compensation to Mr. Rutcosky. I don't know whether the method that I have used is what someone else is going to say is correct. Maybe I should have decided that the work product was worth "X" number of dollars. And forgotten about the overriding royalty. I think there is a basis for doing that because we have "X" number of revenues generated to date, and a reasonable prognosis is that there will be a certain amount generated in the future. I think I could have gone that way. I chose to go this way because I felt in all fairness to all parties, Rutcosky would receive money only so long as the college received money. The other way is a little more chancy and risky in my opinion because I could order an amount, and all of a sudden the program could stop tomorrow.

(RP 888-889). Thus the overriding royalty was a method of compensation chosen by the court. Regardless of whether BBCC's liability was based on infringement of common law copyright, estoppel, quantum meruit or express contract, the court's fashioning of an equitable remedy to compensate Rutcosky for the use of his intellectual work product draws no federal question into this case.

2. Assuming arguendo that the sole ground of decision was express contract, the determination of what effect to accord a possible violation of 10 USC § 2306(b), as that violation affects the rights and obligations between BBCC and Mr. Rutcosky, is solely a matter of state law

Initially, respondent concedes that 10 USC § 2306(b) presents a federal question insofar as the issue is: (1) whether that statute applies to an agreement between the Army and BBCC; or (2) whether BBCC violated that statute; or (3) what remedies are available to the government should it choose to assert any rights against BBCC for violation of that statute. (In the latter regard, neither the Army nor the VA has ever claimed that BBCC violated 10 USC § 2306(b)).

As such, respondent concedes that whether BBCC was compensated for its services from federal or non-federal funds is a federal question (Respondent does not concede that the Washington State Supreme Court's comments on that issue merit review by this court.) Here, however, BBCC does not simply seek review of that issue. The college also asks this court to delineate the rights and obligations between a party allegedly contracting with the government (BBCC) and a third party (Rutcosky). Assuming that such parties contract on a contingent fee basis for the third party to solicit a governmental contract, BBCC asks this Court to rule that the contingent fee contract between the governmental contractor and the third party is void per se even if no undue influence is employed. In this regard 10 USC § 2306(b) on its face does not purport to define any such rights and obligations; the statute concerns only the relationship between the government and a party contracting with it. In short, BBCC asks this Court to determine, by common law standards, the enforceability of a private contract.

However, where litigation is purely between private parties and does not impact upon the rights, duties or significant interests of the United States, the legal issue is to be determined by state law. Bank of America Nat'l. Trust & Savings Ass'n. v. Parnell, 352 U.S. 29, 77 S.Ct. 119, 1 L. Ed. 2d 93 (1956); cf. United States v. Yazell, 382 U.S. 341, 15 L. Ed 2d 404, 86 Sup Ct. 500 (1966). Accordingly, respondent submits that the enforceability of any contract between BBCC, a college, and Rutcosky, a Washington citizen, is a matter of state law and poses no substantial federal question.

B. The Judgments Below Were Correct and The Record in This Case is Peculiarly Ill-suited for Reviewing the Issue of Illegality Since BBCC Did Not Raise the Defense Until After Entry of the Trial Court's Memorandum Opinion, and the Record Itself is Bereft of Any Evidence Establishing a Violation of 10 USC § 2306(b)

For the prohibition of 10 USC § 2306(b) against contingent fees to apply, BBCC must prove that: (1) BBCC retained Rutcosky on a contingent fee basis; (2) Rutcosky was retained by BBCC to "solicit or obtain" a contract with the Army; (3)

the Army "negotiated" a "contract to purchase" services from BBCC; and (4) payment for such services was to be made from "appropriated funds." The Washington State Supreme Court addressed only requirement number four but the record and findings of fact reveal that BBCC failed to prove any of these elements and 10 USC § 2306(b) is simply inapplicable.

The lack of evidence on the issue was understandable because BBCC did not plead the illegality defense prior to or during trial. At trial, the college denied the existence of any contract between itself and Rutcosky. The alleged violation of 10 USC § 2306(b) was first raised as an afterthought after the trial court entered its memorandum opinion. After additional special hearings and extensive briefing, the court denied BBCC's motion and entered Conclusion of Law XXI, unchallenged on appeal, that there was no evidence to warrant conforming the pleadings to the proof under Washington law.

1. The trial court expressly found that Rutcosky was not retained by BBCC on a contingency basis

Unchallenged finding of fact XVIII, supra, establishes that Rutcosky was not retained by BBCC on a contingency basis to obtain a governmental contract. Moreover, Judge Clarke's comments, supra, establish that the court itself chose a royalty rather than a lump sum payment as the method for compensating Rutcosky out of considerations of equity and fairness. Surely, the fashioning of an equitable remedy by a judge to fairly compensate Rutcosky for the use of his intellectual work product by BBCC cannot be held to violate 10 USC § 2306(b).

2. There is no evidence in the record that BBCC retained Roger Rutcosky to "solicit or obtain" a government contract--hence § 2306 is inapplicable

A fundamental distinction exists between soliciting a government contract and performing services in connection with the preparation of a bid for governmental business. Browne v. R & R Engr. Co., 264 F.2d 219 (3d Cir. 1959). There, Browne knew of a corporation which had been awarded

Atomic Energy Commission contracts and which was about to seek bids on subcontracts. Browne encouraged the defendant R & R to bid on these subcontracts. He agreed to use his acquaintances with various persons to obtain a place for the defendant on the invitational list of bidders. Brown also assisted in preparing drawings, estimates and technical data required for bidding and, later, assisted in reorganizing R & R and attempting to obtain financing for it. It was understood that payment to him was contingent upon R & R obtaining one or more subcontracts. Ultimately, R & R obtained a series of subcontracts. The trial court concluded that Browne's contract with R & R violated Executive Order 9001 (the predecessor of § 2306) and therefore denied recovery.

The Third Circuit reversed, distinguishing a person hired to solicit a government contract from a person employed to perform services in preparation of bids for a government contract. The former is illegal; the latter is not. The court observed:

> [T]here was much more to the services [plaintiff] Browne bargained to render and did render than this obtaining of a listing. He performed technical work requiring engineering skill. He prepared estimates and other data. He worked on some administrative problems.
>
> . . .
>
> To us it seems clear that this work involved no more "soliciting or securing" a contract than would the work of a typist who puts bids in final form or a photographer who had taken pictures in support of a bid, or even a bondsman who had supplied a performance bond. When both the language of Executive Order 9001 and the evils of improper influence at which it aims are considered, it seems a proper conclusion that the technical performance of engineering, technical and administrative work involved in the preparing of cost estimates, bidding data and specifications on a contingent fee basis is not contrary to law or public policy.

The court held that only the plaintiff's work in obtaining eligibility for R & R to bid for contracts was illegal and allowed full recovery on a quantum meruit basis for all other services which the plaintiff performed to the defendant's benefit.

If the performance of engineering, technical and administrative work in the preparation of contract bids on a contingent fee basis is not contrary to law, certainly it would seem that Rutcosky's preparation of an educational program

for BBCC to transmit to the Army would not be illegal. This would be particularly true as Rutcosky, unlike Browne, was neither retained by the college "to solicit or obtain" nor did he in fact solicit, or obtain a contract for BBCC with the Army (see Finding of Fact XVIII, supra).

However, there is inherent in the Rutcosky case an additional substantial distinction which clearly sets it apart, even from the Browne case. The gravamen of Rutcosky's claim was not for compensation for developing a program to be used by BBCC in securing the ESA agreement or agreements but in BBCC's use of his intellectual work product in the performance of BBCC's ESA agreements on behalf of military personnel. One must continue to view this case in terms of the context of the factual issues presented at the trial. In that context BBCC denied any agreement with Rutcosky whatsoever. Further, BBCC denied that it had ever used Rutcosky's intellectual work product at any time in the performance of its educational programs for servicemen under any of its ESA agreements. In

fact, BBCC continues, at this very date, to deny that it is using in any form or context, modified or otherwise, any of Rutcosky's intellectual work products in any of its educational programs. The trial court found against BBCC and in favor of Rutcosky on these important, essential factual issues. The Washington State Supreme Court affirmed the trial court's Findings and Conclusions on these essential factual issues in every respect. Counsel for the respondent Rutcosky would submit that the United States Supreme Court is not a proper forum to relitigate factual issues.

3. The Army did not negotiate a "contract to purchase" property or services from BBCC--hence § 2306 is inapplicable

The Army/BBCC ESA demonstrates that the Army did not contract to purchase property or services within the meaning of 10 USC § 2306(b) since the Army incurred no monetary obligations and, in fact, disclaimed any obligation to pay BBCC for its educational services to GI's. Paragraph 6 of the ESA provided:

(a) The contractor shall be responsible for collecting all charges for instruction from the student.
(b) The Department of the Army shall have no responsibility for the payment of any appropriated or nonappropriated funds under this agreement and shall, under no circumstances, be responsible for payment of any tuition, charges, fees, or other payments hereunder.

(Emphasis added.)

That the Army did not "contract" with BBCC to purchase "services" is further illustrated by the method adopted for compensating BBCC. Unlike other military programs, payment to BBCC under PREP was the sole responsibility of the individual GI, not the Army. Upon enrollment for PREP, each GI signed a Veterans Administration form which listed inter alia the credit hours taken and also signed a power of attorney authorizing BBCC to endorse the GI's VA check in favor of the college. The VA then issued and sent to BBCC a check in the name of the GI which BBCC then cashed by exercising its power of attorney. BBCC then issued a receipt to each GI, which evidenced payment by that GI for BBCC's educational services (Finding XLIV). See also 38 USC. § 1696(a); 38 USC § 1780(d).

Plainly, the Army did not "contract" with BBCC to purchase "services" within the meaning of § 2306(a). More precisely, as admitted by President Wallenstien (RP 67), the Army simply granted BBCC a license to operate the PREP program in Europe. The only "contract" for educational services was between BBCC and the individual GI's who enrolled in the program. The Army was not obligated to pay BBCC anything and, accordingly, the ESA, although it did not contain a warranty against contingent fees, was not illegal. See also, 41 CFR § 1-1.507(3) (1971) (warranty against contingent fees not required if Army not obligated to pay more than $25,000).

4. Payment to BBCC for its services was not from "appropriated funds"--hence § 2306 is inapplicable

An "appropriation" is (1) a statutory authorization, (2) to make payments out of the United States Treasury, (3) for a specified purpose. See § 21, Bureau of the Budget Circular No. A-34 (July 1957); 31 USC § 16.65(c)(1). See also Department of the Army, Procurement Law, 40 (1961). In some military educational programs, the military pays

the college directly from the appropriated funds. Under such programs, federal regulations require that the ESA contain a warranty against contingent fees. See A.P.P. 4-5401-5404 (located at 4 CCH Gov't Contracts Reporter at 28,373-28,374). However, under PREP the individual student, not the military, pays the college from earned VA education benefits (Finding XLIV--unchallenged). Once the VA benefit checks are drawn in favor of the GI, they become the vested property in the GI. Porter v. Aetna Casualty & Surety Co., 370 U.S. 159, 8 L. Ed. 2d 407, 82 S. Ct. 1231 (1962). As such, these educational benefits become private funds belonging to the GI. It is the GI who contracts with BBCC and who is obliged to pay BBCC. Manifestly, the college is compensated from the GI's in private funds and not from appropriated funds.

C. This Private Dispute is Not of Broad Public Import and Presents No Significant Federal Issues That Are Likely to be Recurring

Petitioners insist that there lurks in this case an important issue of federal law which this court must settle. In fact, however, the issues

here as previously discussed were and are fundamentally factual and do not warrant additional review by this Court.

To buttress the importance of the case, BBCC states, although there is no evidence of such in the record, that 200 schools which have offered PREP programs have received nearly 48 million dollars. That unverified statement represents a naked effort to persuade the Court that substantial public monies are at stake. However, this case involves one school, BBCC, and one man, Mr. Rutcosky. Assuming, arguendo, that 199 other schools offer PREP programs, there is certainly no indication that their ESA's were obtained through any alleged illegal contingent fee arrangements nor that these schools were using the intellectual work product of an individual without properly compensating him. Strangely, BBCC offers no citation to any other pending litigation. It is suspected that none exists.

BBCC also attempts to magnify the importance of this case to itself by inaccurately suggesting that it is on the "horns" of some undefined "federal-state dilemma." Sole reliance for this

contention is placed on the exceedingly fragile basis of three hearsay letters between the General Accounting Office (GAO) and the Veterans Administration (VA), which are not a part of the record of this case. In any event, respondent perceives no "dilemma" confronting BBCC which warrants review by this court of the lower courts' decisions. BBCC's problems with the VA, if any, involve alleged improper overcharges and are irrelevant and not related to the college's legal obligations to Rutcosky, particularly since the VA has never contended that the college's obligation to Rutcosky is illegal. Certainly, the VA's rights, if any, and Mr. Rutcosky's rights are not mutually exclusive. Even assuming that the payments to BBCC for its PREP services were from "appropriated funds," (as BBCC states the VA "implicitly" considers them to be) this would not alter the result herein for the reasons stated previously, i.e., unchallenged findings of fact that Rutcosky was not retained on a contingency basis and that Rutcosky did not solicit, negotiate or obtain a contract with the Army. In short, BBCC's alleged personal "dilemma,"

which supposedly necessitates review by this Court, is neither important nor real.

CONCLUSION

Had the court fashioned a lump sum award as an equitable remedy for Mr. Rutcosky, 10 USC § 2306(b) would not be applicable. However, because the judge chose to compensate Mr. Rutcosky with a royalty based upon a percentage of the gross revenues, BBCC alleges that it entered into an illegal contingent fee agreement with Rutcosky. This allegation of illegality, with the attendant innuendos of underlying albeit undisclosed corruption, was first raised after the trial was over and after the judge had found in favor of Mr. Rutcosky. This afterthought should be treated for what it is--a belated attempt by the college, without factual foundation, to avoid its legal and ethical responsibilities to a person whose personal efforts bestowed upon the college "overwhelming financial and status improvement." (Finding XLVIII). The record itself is devoid of any evidence establishing the elements to render 10 USC

§ 2306(b) applicable to this case. It is at least odd that the college characterizes its relationship with Rutcosky as illegal although the Army has never done so and although BBCC remains active in offering military educational programs to American GI's.

Again, it is important to keep in mind that Rutcosky's claim for compensation and the court's judgment awarding him compensation against BBCC in this case were in no way based on a claim for services rendered BBCC in securing a contract or agreement but, to the contrary, Rutcosky's claim in the court's judgment was based solely on the use by BBCC of Rutcosky's intellectual work product in the performance of its various educational programs. BBCC could have escaped liability by the simple expedient of ceasing to use Rutcosky's intellectual work product in their educational programs. When viewed from this perspective, one perhaps can better understand the inherent fairness and equity of the remedy finally fashioned by the

trial court which the appellant would have this court overturn.

It is respectfully submitted that certeriori be denied.

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